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# In the Supreme Court of the United States

OCTOBER TERM, 1949

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No. 433

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

MASSEY GIN AND MACHINE WORKS, INC.

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on April 14, 1949, denying enforcement of an order issued by the Board against Massey Gin and Machine Works, Inc.

**OPINIONS BELOW**

The opinion of the court of appeals (R. 85) is reported at 173 F. 2d 758. The findings of fact, conclusions of law and order of the Board (R. 46-82) are reported at 78 N. L. R. B. 189.

**JURISDICTION**

The judgment of the court of appeals was entered on April 14, 1949 (R. 85-86). The Board's

petition for rehearing (R. 86-88) was denied on May 30, 1949 (R. 89). On August 26, 1949, by order of the Chief Justice, the time within which the National Labor Relations Board might file a petition for a writ of certiorari was extended to and including October 28, 1949 (R. 90). The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254 (1).

### QUESTION PRESENTED

Whether a court of appeals is under a duty to state its reasons for refusing to enforce an order of the National Labor Relations Board where there exists a number of grounds on which the court's action might be based.

### STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151, *et seq.*) and of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. II, 141, *et seq.*) are set forth in the Appendix, *infra,* pp. 19-24.

### STATEMENT

Following the usual proceedings under Section 10 of the original and amended Acts, the Board, on July 13, 1948, issued its findings of fact, conclusions of law and order (R. 46-51, 81-82) which may be summarized as follows:[1]

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[1] In the following statement, the record references preceding the semi-colons are to the Board's findings; succeeding references are to the supporting evidence.

On September 27, 1946, while negotiations for the renewal of a contract between Massey Gin and Machine Works, Inc., herein called the Company, and International Union of Mine, Mill, and Smelter Workers, C.I.O., herein called the Union, were in progress, the Company, without consultation with the Union, posted a notice informing its employees that the starting time of work for one group of its employees, the day hands, would be changed from 7:30 a.m. to 8:00 a.m., commencing Monday, September 30 (R. 57-59; B. A. 18-19, 51-52, 84, 94, 112-113, 139, 145-149). Existing contract provisions forbade the setting of earlier hours, except under specified conditions, but were silent as to the setting of later hours (R. 58; B. A. 94, 149).

After posting the notice, the Company called to the attention of the Union's Shop Committee the fact that the change in starting time for this group of employees had been made (R. 59; B. A. 119). The Shop Committee then consulted with the day hands and protested the change to the Company, but to no avail (R. 59; B. A. 51, 55-56, 62-64, 85).

The fifteen day hands reported to work on September 30 at 7:30 a.m., their regular starting time, and after again protesting vigorously against the change in starting time, were permitted to work that day on their old schedule while their union representatives made further unsuccessful attempts to persuade the Company

officials to change their minds (R. 59-60; B. A. 51, 56-58, 64, 80, 88-90). At the end of the work day, the Company's president assembled the day hands in the shop and asked for a show of hands of those who were willing to accept the Company's new work schedule (R. 60; B. A. 52, 57-59, 64, 89, 103). No hands were raised (R. 60; B. A. 59, 89, 103). He then turned to the Shop Committee members and instructed them to inform the molders that they need not report for work until the Company was able to get day hands who would work on the new schedule (R. 60; B. A. 59, 89).

Nevertheless, the day hands again reported for work at 7:30 a.m. the next day (R. 61; B. A. 65, 90). A majority of them insisted that any change by the Company in the starting time would be in violation of the existing contract and that it could not lawfully be put into effect without an agreement between all concerned (R. 61; B. A. 65-66, 90). The Company disagreed with this position, refused to postpone further the effective date of the new schedule, and insisted that the men would not be permitted to work except under the new schedule (R. 61; B. A. 21-22, 52-53, 65-66, 69, 90-91). The Union's international representative, who was consulted, suggested that the day hands "try to work if [they] could" (R. 61; B. A. 69). After a brief discussion among themselves, however, they left the plant (R. 48, 62; B. A. 69, 92). The contract under which the Company and the Union were then

operating did not contain a no-strike clause (R. 70; B. A. 112).

On the afternoon of the same day, October 1, at a bargaining conference with the Union, the Company announced "that the employment of the 15 day hands who refused to work has been terminated, and that they are no longer in the employ of the Company" (R. 48, 62; B. A. 22-23, 48, 93, 146). On the following day, when seven of the employees requested their termination notices, the Company gave them separation slips on which it was stated that the employees were discharged "for refusing to do work assigned" (R. 48, 62; B. A. 67, 95, 147-148). The Union thereupon filed charges with the Board alleging *inter alia* that the Company had discriminated against the day hands in violation of Section 8 (3) of the Act (R. 48, 62; B. A. 44, 94).

After attempting to operate without the day hands for about a week, the Company closed its plant for two weeks, during which time it secured replacements for nine of the day hands (R. 63; B. A. 53-54, 98, 133). When it reopened its plant, operating under its new starting schedule for day hands, the Union requested the Company to reinstate the discharged day hands with full seniority and with back pay from the date of their discharge (R. 63-64; B. A. 23-24, 94-96, 129). The Company replied that it would not reinstate them but that it would rehire them as new employees over a pe-

riod of thirty days (R. 64; B. A. 158-159). The Union refused to accept this offer (R. 64; B. A. 46).

Upon these facts, the Board concluded that the day hands, by ceasing work in protest against the Company's change in their working hours, were engaging in a strike, a form of concerted activity protected by the Act, and that the Company, by discharging them for having engaged in such activity, had engaged in interference, restraint, and coercion in violation of Section 8 (1) of the Act and in discrimination with regard to hire and tenure of employment in violation of Section 8 (3) of the Act (R. 49, 69-72). To remedy these unfair labor practices, the Board issued an order requiring the Company to cease and desist therefrom, to reinstate the day hands with back pay from the date on which the Union requested the Company to reinstate them, and to post appropriate notices (R. 49-51).

On January 14, 1949, the Board filed in the court below its petition to enforce its order (R. 1-6). Numerous issues were raised by the Board's decision and order and the briefs of the Board and the Company before the court below.[2] Some of these issues were: Whether the Company's change in working hours of its day hands was, as the Company contended (Co. Br. p. 19), within its exclusive managerial prerogative or, as the Board

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[2] Copies of these briefs, although not a part of the official transcript of the record, are lodged with the Clerk of this Court, for the convenience of the Court.

held (R. 66-67), a subject of bargaining; whether, in striking in protest against the change in hours, the day hands, as the Board found (R. 47), engaged in protected concerted activity or, as the Company contended (Co. Br. p. 21; Co. Supp. Br. p. 4), in a strike both in violation of the contract and unauthorized by the Union; whether, as the Board found (R. 48, 68-70), the employees had in fact struck against the Company's action or, as the Company contended (Co. Br. p. 20), had quit their jobs; whether, as the Company contended (Co. Br. pp. 13-14, 18), the absence of an intention on the part of the Company to discourage membership in the Union rendered the Company's conduct immune even if the employees were in fact discharged for engaging in protected activity; whether, as the Company further contended (Co. Br. p. 18), the absence of a positive showing of adverse effect upon union membership resulting from the Company's conduct constituted a complete defense; and whether, again as contended by the Company (Co. Supp. Br. pp. 7-9), the fact that the Union, in applying for reinstatement on behalf of the day hands, also asked for back pay from the date of their discharge, impaired the validity of the Board's back pay and reinstatement order.

On April 14, 1949, the court below handed down its *per curiam* opinion stating merely: "It is ordered that the petition of the Board for enforcement of its order be, and the same hereby is, denied." (R. 85). On May 5, 1949, the Board filed

its petition for rehearing, requesting the court below to state its reasons for denying the Board's petition for enforcement (R. 86-88). On May 30, 1949, the court below, without opinion, denied the petition for rehearing (R. 89).

### SPECIFICATION OF ERRORS TO BE URGED

1. The court below erred in failing to state its reasons for denying the Board's petition for enforcement.

2. The court below erred in denying the Board's petition for rehearing.

### REASONS FOR GRANTING THE WRIT

The instant case is one of the five cases which, as is set forth in the Board's petition for a writ of certiorari in *National Labor Relations Board* v. *Atlanta Metallic Casket Co.*, No. 431, pp. 10-23, filed contemporaneously, the Board has selected as vehicles for bringing before this Court its difficulties in securing enforcement of its orders in the Fifth Circuit. In the instant case as in the *Atlanta Metallic* and *Wilson* [3] cases, the court below failed to disclose the reasons which impelled it to set aside the Board's order. As shown in the Statement, *supra*, pp. 6-7, the Board's findings and order in this case involve novel and important questions of law in addition to the usual issue of the substantiality of the evidence. The refusal of the court below to en-

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[3] *Wilson & Co., Inc.* v. *National Labor Relations Board*, in which a petition for a writ of certiorari is being filed contemporaneously herewith.

force the Board's order could have been based upon any one or more of several grounds. The Board has no knowledge of the basis upon which the court below acted and cannot therefore determine whether the judgment of the court below is in conflict with decisions of other courts of appeals or with this Court, or whether the court's decision otherwise involves questions of importance in the administration of the Act.

The Board, however, believes it important in the administration of the Act for a court of appeals to state the grounds for its decision in a case of this nature not only because Congress assigned to both the Board and the court, through coordinated action, the duty of making the Act effective but because this Court, in the absence of such stated grounds for decision, is denied an important aid in the consideration of cases which come before it on petitions for writs of certiorari.

1. Under the statutory scheme for administering the Act, both before and subsequent to its amendment, the Board has the duty of making findings of fact in an unfair labor practice case, of initially determining questions of law, and of issuing an order which it deems appropriate to remedy the unfair labor practices found (Section 10(c) of the Act). However, the Board's order is not self-executing. It may be enforced only by the courts, which have a limited scope of review over the Board's findings and order. Section 10(e) and (f) of the Act, as amended, Section 10(e) of the Ad-

ministrative Procedure Act (60 Stat. 237, 5 U.S.C. 1001, *et seq.*) and the cases thereunder have defined this scope of review. For instance, by virtue of Section 10(e) of the Act, as amended, the courts must accept the Board's findings of facts if they are supported by substantial evidence upon the record considered as a whole.

The Board's power to administer the Act is thus "subject to the supervisory powers of the Courts of Appeals." *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318, 342-343. The Board and the court must each work with the other in securing obedience to the Act's mandates. The relationship of an administrative agency, such as the Board, to the reviewing court has been aptly described by this Court in *United States* v. *Morgan*, 307 U. S. 183, 191:

> * * * in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coordinated action. Neither body should repeat in this day the mistake made

> by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if it must be, but never to be encouraged or aided by the other in the attainment of the common aim.

To like effect, see *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 620-621, and *United States* v. *Ruzicka*, 329 U. S. 287, 295.

If the reviewing court and the Board are to attain the end prescribed by the statute "through coordinated action," as this Court stated in the *Morgan* case, it would appear necessary for the court to advise the Board as to the points of divergence between its views and those of the Board. Without such clarification, which can only come from a statement by the court of the grounds for its decision, the Board does not know what error, if any, it has committed. It may therefore unwittingly repeat the same or similar errors in other cases coming before it.

Since, as stated by this Court in *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 364, "The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices,"[4] it is, we submit, even more important that

[4] To the same effect see, *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, 337; *Virginian Railway Co.* v. *System Federation No. 40*, 300 U. S. 515, 552; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 193; *Walling* v. *Reuter Co.*, 321 U. S. 671, 674-675.

the reviewing courts state their grounds for decision in Board cases than in cases involving private litigants. Members of the public, whether or not they be direct participants in labor disputes, should know how the Act is being interpreted and applied by the courts as well as by the Board. Education of the public and the parties concerning their respective rights under the Act can undoubtedly help achieve industrial peace. Action such as that by the court below in this case cannot contribute to that end.

No court of appeals except that for the Fifth Circuit has ever failed to inform the Board of its reasons for denying enforcement of Board orders. This has been true even when the sole issue involved was whether substantial evidence supported the Board's order. The court below, however, within a period of a few weeks, denied enforcement of two Board orders apparently involving only substantiality of evidence questions,[5] as well as of the Board order here involved which, in addition to raising the substantiality of evidence issue, gives rise to a number of important legal questions. Such action by the court below, especially in a case such as this one, amounts, we believe, to a repudiation of its supervisory role and renders impractical a uniform administration of the Act throughout the country. Other courts of appeals, as well as the

[5] In these cases, *National Labor Relations Board* v. *Atlanta Metallic Casket Co.*, 173 F. 2d 758, and *Wilson & Co., Inc.* v. *National Labor Relations Board*, 173 F. 2d 979, we are simultaneously herewith petitioning this Court for writs of certiorari.

Board, need the views of the court below on the important questions of law presented in this case in reaching uniform and sound decisions on such questions.

It is also important that a court of appeals state the grounds for its decision in order to afford the Board an intelligent basis upon which to determine whether to apply to this Court for a writ of certiorari. Where, as here, there exist a number of possible grounds upon which the court below might have rested its judgment, it is difficult for the Board to decide whether the decision of that court conflicts with that of other courts of appeals or whether other commonly urged grounds for a petition for certiorari exist. This Court, in admonishing the lower courts to state the grounds for their decisions, has frequently mentioned as one of the reasons for this requirement the fact that litigants need the court's findings for an intelligent and orderly presentation of an appeal. Thus, this Court stated in *Virginian Railway* v. *United States*, 272 U. S. 658, 675:

> Unless an opinion indicating the grounds of the decision is delivered, a defeated party may often be unable to determine whether the case presents a question worthy of consideration by the appellate court. This is particularly true, where the case is in equity and the decree is entered upon a hearing involving complicated facts. For being in equity, matters of fact as well as of law are reviewable; and the reviewable issues of law are rarely sharply defined by requests for rul-

> ings. The failure to accompany the decree by an opinion may thus deprive litigants of the means of exercising a sound judgment on the propriety of an appeal.

See also, *Mayo* v. *Canning Co.*, 309 U. S. 310, 317; *Railroad Commission of Wisconsin* v. *Maxcy*, 281 U. S. 82, 83; *Public Service Commission of Wisconsin* v. *Wisconsin Telephone Co.*, 289 U. S. 67, 69; *Lawrence* v. *St. Louis-San Francisco Ry.*, 274 U. S. 588, 596; *Cleveland Ry.* v. *United States*, 275 U. S. 404, 414.

2. In refusing to state its reasons for denying the Board's petition for enforcement, the court below has denied this Court the opportunity, often insisted on, to be informed by the lower courts of the grounds for their decisions in order to aid this Court in its consideration of the case. In various types of cases, this Court has remanded cases to the lower courts for findings of fact or a statement of grounds for the court's action. These remands have been directed both to courts of appeals and to district courts and without regard to whether any rules of court such as Rule 52, Rules of Civil Procedure for District Courts, Equity Rule 70½, or Admiralty Rule 46½ may have required findings of fact and conclusions of law in particular types of cases.[6]

Thus, in *Times-Mirror Co.* v. *National Labor*

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[6] Cf. 28 U. S. C. 2071 (effective September 1, 1948), requiring that the rules of each court established pursuant to Act of Congress "shall be consistent with Acts of Congress and rules prescribed by the Supreme Court."

*Relations Board,* 331 U. S. 789, this Court vacated the judgment of the Court of Appeals for the Ninth Circuit and remanded the cause with directions to make findings of fact. That court had adjudged the Times-Mirror Company to be in contempt of the court's decree enforcing a Board order but had made no findings of fact in connection with its contempt judgment. In a more recent case, *Griffin* v. *United States,* 336 U. S. 704, this Court remanded the cause to the Court of Appeals for the District of Columbia with directions to that court to decide, in the first instance, what rule of evidence should prevail where that court had dismissed, without opinion, an appeal from a motion for new trial because of newly discovered evidence. This Court commented (at 707-708) that, "Unfortunately, the Court of Appeals evidently thought that the ground for dismissing the appeal was too clear to require explication. It dismissed the appeal without an expression of views regarding the admissibility of the evidence on which the claim for a new trial rests." This Court then pointed out several grounds upon which the evidence could have been held inadmissible.

In another case, *Baltimore and Ohio R. Co.* v. *United States,* 279 U. S. 781, this Court reversed a dismissal by a district court of a suit by complainant railroads to set aside certain rates established by the Interstate Commerce Commission. The complainants then sought reimbursement in the district court for their losses incurred during

the pendency of the appeal from the erroneous judgment of the district court and that court denied restitution, without an opinion. In again reversing the district court, this Court stated (at 787): "The lower court entered its decree dismissing the suit and, after reversal here, denied restitution without opinion, statement of reasons or citation of authority. The questions were important, and the amounts involved were large. The judges should have given the reasons on which they rested their decisions."

In a number of other cases involving suits in district courts to enjoin the enforcement of orders of administrative agencies or officials of the Federal or State governments, this Court has likewise been unwilling to decide the issues without the benefit of the lower courts' opinions and has required the courts to state their reasons for the action taken. See *Virginian Ry.* v. *United States,* 272 U. S. 658, 674-675; *Railroad Commission of Wisconsin* v. *Maxcy,* 281 U. S. 82, 83; *Lawrence* v. *St. Louis-San Francisco Ry.,* 274 U. S. 588, 596; *Cleveland Ry.* v. *United States,* 275 U. S. 404, 414; *Public Service Commission of Wisconsin* v. *Wisconsin Telephone Co.,* 289 U. S. 67, 69-71; *Mayo* v. *Canning Co.,* 309 U. S. 310, 316-317; *Arkansas Railroad Commission* v. *Chicago, R. I. & P. R. R.,* 274 U. S. 597, 603; see also *Sparks* v. *Mellwood Dairy,* 74 F. 2d 695, 696 (C.A. 6). In those cases the orders or rulings of the agencies or officials involved were binding upon the

parties until and unless enjoined or set aside by the courts. Court review of such administrative orders was therefore obtained by application to enjoin rather than by petition to enforce, as is necessary to make Board orders effective. The principles involved, however, are the same. It is equally important in both types of cases that the courts state their reasons for rejecting the administrative agency's action.

In each of the cases cited, a major consideration for requiring a statement of grounds for decision, aside from its value to the litigant, was the fact, as stated in the *Virginian Railway* case, *supra,* (272 U. S., at 675) that "the appellate court, being without knowledge of the grounds of decision below, is denied an important aid in the consideration of the case, and will ordinarily be subjected to much unnecessary labor." For the same reason this Court has likewise shown its reluctance to dispose of a case in which, although an opinion has been written, all important issues have not been fully explored and explicated by the lower courts. See *National Labor Relations Board* v. *Donnelly Garment Co.,* 330 U. S. 219, 237; *City of Hammond* v. *Schappi Bus Line,* 275 U. S. 164, 169.

## CONCLUSION

It is respectfully submitted that, for the foregoing reasons, this petition for a writ of certiorari should be granted, and that the order entered by the court below on April 14, 1949, should be set

aside without oral argument and the case remanded to the court below with directions to issue an opinion stating the grounds for its denial of enforcement of the Board's order.

PHILIP B. PERLMAN,
*Solicitor General.*

ROBERT N. DENHAM,
*General Counsel,*
*National Labor Relations Board.*

OCTOBER 1949.

APPENDIX

The relevant provisions of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

* * * * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * * * *

SEC. 10. * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the

Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

* * * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall

have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

The relevant provisions of the National Labor Relations Act as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. II, 141, *et seq.*) are as follows:

* * * * * * *

SEC. 10. * * *

* * * * * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be

served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners

thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

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(e) The Board shall have power to petition any circuit court of appeals of the United States * * * for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be

considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. * * *

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1949

No. 433

NATIONAL LABOR RELATIONS BOARD,
Petitioner.

*v.*

MASSEY GIN AND MACHINE WORKS, INC.,
Respondent.

# BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI AND OBJECTIONS TO THE JURISDICTION OF THIS COURT

Massey Gin and Machine Works, Inc., respectfully interposes objections to the jurisdiction of this Court to grant the writ of certiorari and opposes the grant of the writ.

As the petition indicates, this is one of five cases which the Board has selected as vehicles for expressing its displeasure with the Court of Appeals for the Fifth Circuit. In this case the Board specifically refers to the petition for certiorari, and particularly to its statement of reasons for granting the writ, in No. 431, *National Labor Relations Board v. Atlanta Metallic Casket Co.*, (Petition, page 8). Its repeated references to the four companion cases are obviously intended to incorporate by reference in this petition the reasons assigned in those cases which are common to all. Following this pattern, respondent herein incorporates by reference the objections and the reasons therefor assigned by the respondents in the companion cases which are common to all, particularly in No. 431, and submits that they should be sustained in this case.

In this connection we call attention to the fact that the date of the decision below, the date of the order extending the time for filing the petition for certiorari, and the date of the first notice to respondent or its counsel of the extension of time and of any intention to apply for the writ, are all identical with the corresponding dates in the Atlanta Metallic Casket Company case, No. 431.

With specific reference to this case, this Court is without jurisdiction, and the writ should be denied, for the further reason that no error is specified which presents any question for decision by this Court.

According to the petition (pages 6 and 7) there are six separate and distinct grounds on any one of which the lower court could have refused enforcement. If the Board was wrong on any one of the six questions the decision of the Court of Appeals was admittedly correct. The Board has not asked this Court to consider those questions, has not contended that any question was erroneously decided, and has not even claimed, either in the petition or in the motion for rehearing in the court below, that the lower court committed error in refusing the enforcement order. The sole complaint in this case, considered apart from the companion cases, is that the lower court did not write an opinion stating the specific reasons for its decision.[1]

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[1]The petition (page 2) states that this is the "Question Presented." The specification of errors (petition, page 8), is limited to this point. Although it specifies that the "court below erred in denying the Board's petition for rehearing", the prayer of the petition for rehearing was as follows: "Wherefore, it is prayed that a rehearing be granted and that, upon reconsideration of the Board's order, the Court vacate and set aside its opinion of April 14, 1949, and issue in its stead an opinion either enforcing the Board's order or stating the reasons for denial of the Board's order, and grant such other and further relief as the Court may deem proper." To specify as error the failure to grant this prayer is to do no more than to specify as error the failure to write an opinion.

While it is no doubt true that the Supreme Court may remand a case for specific consideration of certain questions by the lower court, that is done only where a question is presented to the Supreme Court for decision which cannot be decided before, or can best be decided after, other specific questions have been passed on by the lower court. Since the order of the court below is not alleged to be erroneous no question is presented to the Supreme Court in this case and there is no need for any further decision by the lower court.

For these reasons we respectfully submit the petition for a writ of certiorari should be denied.

A. O. B. Sparks
C. Baxter Jones
Charles M. Cork

*Attorneys for Respondent*